Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")	)	CG Docket No. 11-116
Consumer Information and Disclosure	)	CG Docket No. 09-158
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

COMMENTS OF SEARCH ENGINE PLUS

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October 24, 2011

TABLE OF CONTENTS

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Search Engine Plus ("SEP"), by and through its attorneys, submits these comments in response to the Federal Communications Commission's ("Commission's") Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceedings.[1]

I. INTRODUCTION

SEP provides search engine optimization, registration of business customers with all of the major search engines (Yahoo, Google, Bing, etc.), unlimited on-line data back-up, and personal content protection. These services are targeted to small businesses that lack the expertise to manage an online presence effectively. SEP bills its services as a monthly fee on the customer's business telephone line. This has proven to be both a low cost alternative to other billing methods and a significant convenience for customers.

SEP verifies each and every order submitted in accordance with LEC third party billing procedures. It is committed to the Commission's goal of ensuring that all services billed on local telephone bills are knowingly and fully authorized by the billed customer.

[1] *See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, CG Docket No. 11-116, Notice of Proposed Rulemaking, FCC 11-106 (rel. July. 12, 2011) ("NPRM").

The bulk of the NPRM discusses proposals to improve the information available on telephone bills and to clarify procedures for the offering of blocking of third-party charges. SEP does not oppose these proposals in concept, provided they can be implemented without increasing the cost of LEC billing and that customers are able to freely choose whether to block third party charges. However, SEP is troubled by suggestions that go beyond the format of telephone bills and intrude upon the terms of third-party billing services. There are several proposals under consideration in the Commission's NPRM that raise this potential concern, but none more alarming to SEP than the suggestion that the Commission could prohibit third-party charges on telephone bills altogether. For this reason, SEP opposes the NPRM in part.

II. A BAN ON THIRD PARTY BILLING WOULD BE UNLAWFUL

While the Commission's desire to ensure that charges on telephone bills are authorized is laudable, the Commission must be mindful that its authority over third party billing services is limited. For the past two decades, the Commission has recognized that it does not have authority pursuant to Title II of the Communications Act to regulate billing and collection services, which are not communications, but rather financial and administrative services. Further, while the Commission can regulate the format and content of a telephone carrier's bills under its Title I authority, it may not extend its authority to prohibit LECs from offering billing and collection services.

A. The Commission Has Determined That It Does Not Have Title II Authority to Regulate Billing and Collection Services

The NPRM asserts that the Commission's authority to adopt cramming rules lies in Section 201(b) of the Act, which requires that "all 'practices...in connection with' common carrier services be 'just and reasonable.'"[2] However, Title II of the Communications Act only

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[2] NPRM, ¶ 83.

permits the Commission to regulate interstate communications offered on a common carrier basis. It does *not* give the Commission authority to regulate billing and collection services subject to private contracts between carriers and third-party service providers.

In 1986, the Commission specifically determined that "carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act."[3] In making this finding, the Commission concluded that "[b]illing and collection service does not employ wire or radio facilities and does not allow customers of the service...to 'communicate or transmit intelligence of their own design and choosing.'"[4] The Commission correctly found that billing and collection is a "financial and administrative service" that is "not subject to regulation under Title II of the Act."[5] Accordingly, the Commission in 1986 deregulated telephone company billing and collection services. LECs, therefore, no longer were required to offer billing and collection, and were given discretion to determine the terms and conditions upon which they would offer the service.

The Commission again confirmed its lack of authority in 1998. At that time, at the urging of the Commission, the telecommunications industry developed new anti-cramming guidelines.[6] The voluntary guidelines include procedures for comprehensive screening of products being charged to local telephone bills, LEC scrutiny of service providers, verification of end user approval of services being charged to their bills, customer dispute resolution procedures and other protections for consumers. With respect to verification of orders, the voluntary

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3 *Billing and Collection Services*, Report and Order, 59 Rad. Reg. 2d 1007, ¶ 31 (1986) ("Billing and Collection Services Order"); *Billing and Collection Services (Reconsideration)*, Memorandum Opinion and Order, 1 FCC Rcd 445 (1986).

4 Billing and Collection Services Order, ¶ 32 (quoting *Nat'l Ass'n of Regulatory Util. Com'rs v. FCC*, 525 F.2d 630, 641 n.58 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (quoting *Indus. Radiolocation Serv.*, Docket No. 16106, 5 FCC 2d 197, 202 (1966)).

5 Billing and Collection Services Order, ¶¶ 32, 34.

6 *FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998) ("News Release").

guidelines affirm that it is the service provider's responsibility to inform end users of all rates, terms and conditions of service and to obtain and retain the necessary end user authorization.[7]

Importantly, the Commission deliberately chose not to implement mandatory obligations. In the News Release announcing the voluntary industry guidelines, the Commission noted that the guidelines had been developed quickly and "had traditional regulatory rulemaking processes been used, the project would have taken much longer to complete."[8] The Commission's role, the News Release continued, is to educate consumers and to help them understand their telephone bills (the latter role ultimately leading to the *Truth-in-Billing* rules).[9] The Commission did not express a role in regulating the terms of the billing relationship between LECs and third party providers.

There have been no changes to Section 201(b) of the Act since 1986 to alter the Commission's well-reasoned conclusion that billing and collection services are not subject to the its Title II authority.

B. The Commission Does Not Have Title I Ancillary Authority to Regulate Third Party Billing and Collection Services

Perhaps recognizing its tenuous claim of authority pursuant to Title II, the Commission also seeks comment on its ability to regulate cramming under its Title I ancillary authority.[10] The Commission restates the two-part test to exercise its Title I jurisdiction pursuant to last year's *Comcast* decision, but does not provide an analysis of those factors.[11]

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7 Anti-Cramming Best Practice Guidelines, July 22, 1998, at 14 (available at http://transition.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.pdf).

8 *See* News Release at 1.

9 *Id.* at 1-2.

10 *See* NPRM, ¶ 85.

11 *Id.* (citing *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010)). The two-part test discussed further below states that the Commission "may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the

The Commission's assertion in the NPRM of ancillary authority to regulate third party billing and collection services fails both parts of the two-part test for exercise of such jurisdiction. First, the Commission's general jurisdictional grant under Title I does not "cover the regulated subject..." of third-party billing services.[12] In the *Comcast* decision, Comcast conceded that this first test was satisfied because its Internet service qualified as a "interstate and foreign communication by wire."[13] In the instant case, however, billing and collections is not a communication service because, as the Commission previously determined, it "does not employ wire or radio facilities."[14] Therefore, the billing and collection arrangements between local exchange carriers and carrier or non-carrier third-party service providers are not a regulated subject pursuant to Title I of the Act and the Commission's assertion of Title I ancillary authority to regulate cramming fails the first part of the two-part *Comcast* test.

Second, even if third party billing services were within the subject matter of Title I, the proposals to regulate the content of those services are not "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[15] In other words, in order for an action to fall within the Commission's ancillary authority, the action must be ancillary to some authority that the Commission does possess. For example, the regulation of

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regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast*, 600 F.3d at 646 (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

12 NPRM, ¶ 85.

13 *Comcast*, 600 F.3d at 646.

14 Billing and Collection Services Order, ¶ 32

15 NPRM, ¶ 85. In the Billing and Collection Services Order, the Commission recognized that "[t]he exercise of ancillary jurisdiction requires a record finding that such regulation would 'be directed at protecting or promoting a statutory purpose.'" Billing and Collection Services Order, ¶ 37 citing *Second Computer Inquiry*, 77 FCC 2d 384, 433 (1979), *aff'd on reconsideration*, 84 FCC 2d 50, 92093 (1980), 88 FCC 2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983)).

cable TV services (prior to the 1984 Cable Act) was found to be ancillary to the Commission's regulation of broadcast TV services, which clearly were within the Commission's jurisdiction.[16]

Here, there is no connection between the substantive terms of third party billing and any area of the Commission's authority. The Commission has not found that a ban on third party billing relationship is ancillary to any statutorily mandated responsibility over telecommunications services. Oddly, the NPRM only cites to the Billing and Collection Services Order, in which the Commission determined *not* to exercise its ancillary jurisdiction because "no statutory purpose would be served by continuing to regulate billing and collection service...."[17] This statement confirms that the Commission may not reach beyond the form and content of bills to ban third party billing itself.

Put simply, the Commission does not have the authority to regulate third party billing services as it proposed in to do in the NPRM. The Commission's own precedent establishes that billing and collection services are not communications common carriage subject to its Title II jurisdiction. Further, the Commission has not met either part of the test from *Comcast* to exercise Title I jurisdiction over the services.

III. PROHIBITING THIRD-PARTY BILLING ALTOGETHER ALSO WOULD VIOLATE COMMERCIAL SPEECH RIGHTS

A ban on third party billing would eradicate both unauthorized *and authorized* third-party charges on carrier bills, ignoring the growing trend toward the customer convenience of placing charges for third-party services on telephone bills. This proposal overreaches beyond the nature of the potential problem and raises important constitutional concerns as a restriction on commercial speech.

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16 *United States v. Southwestern Cable*, 392 U.S. 157 (1968).

17 Billing and Collection Services Order, ¶ 37.

The Commission recognizes that such restrictions on commercial speech must not be more extensive than necessary to advance a substantial government interest asserted.[18] Even if one were to conclude that the Commission has a substantial interest in protecting consumers from unauthorized third party charges (which may be undercut by its lack of authority to do so), a complete ban on third party billing would not be permitted. Such a blanket prohibition is far more extensive than necessary to serve that interest. In fact, it is the *most extensive* regulatory approach.

The NPRM is replete with alternative regulatory approaches to address instances of cramming that are less extensive than a complete prohibition on third-party billing. These include the voluntary guidelines employed by the wireline industry in 1998 (and by the wireless industry in a related context earlier this month). These alternatives also include regulation of disclosures given to consumers on carrier bills. Further, since the Commission's legitimate concern is *unauthorized* third-party charges on carrier bills, as opposed to all third-party charges, the Commission must show that a ban *directly* furthers the stated goal. Here, such a direct connection would be very difficult to demonstrate because a total ban would restrict billing of both authorized and unauthorized charges, even though the billing of *unauthorized* charges is the only potentially legitimate governmental interest.

In summary, SEP urges the Commission to reject any suggestions that it ban all third party billing. The proposal is grossly over inclusive and most likely would be unconstitutional.

IV. CONCLUSION

Since 1986, the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry has responded with a voluntary code of

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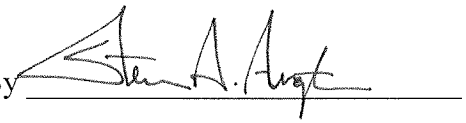
[18] *See id.*, ¶ 86 (citing *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. While not perfect, these guidelines continue to be improved, and have in fact been improved in the past year. SEP urges the Commission to continue to refrain from intruding upon private transactions that for 25 years have been held to be outside the Commission's jurisdiction.

Respectfully submitted,

SEARCH ENGINE PLUS

By 

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October 24, 2011